BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition of SBC Communications, Inc.	)	CC Docket No. 98-227
for Forbearance from Regulation as a	)	
Dominant Carrier for High Capacity	)	
Dedicated Transport Services in Fourteen	)	
Metropolitan Service Areas	)	

COMMENTS OF TIME WARNER TELECOM

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COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its counsel, hereby files these comments in opposition to the above-captioned Petition.[1]

I. INTRODUCTION AND SUMMARY

SBC has not come close to demonstrating that it would be appropriate to remove dominant carrier regulation for its high-capacity services in the 14 urban areas specified in the Petition. Such relief would only be appropriate if SBC could show that it no longer possesses substantial market power. Rather than provide the thorough and detailed market definition and analysis that is required for such a showing, SBC has done little more than list some of the relevant issues for analysis and state in conclusory fashion that these factors weigh in favor of non-dominant treatment. The FCC should therefore summarily reject the SBC Petition. The FCC should further reiterate the

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1 See Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("Petition").

established presumption that an ILEC seeking non-dominant status bears the burden of clearly and thoroughly demonstrating that it lacks market power in the market in question.

If SBC were for any reason granted pricing flexibility for high capacity services at this time, the consequences for competition would be disastrous. Given the freedom to discriminate at will, SBC would almost certainly engage in strategic pricing behavior designed to deter entry and to prevent existing competitors from expanding entry. As the FCC has recently held, SBC is likely to engage in these tactics if granted premature pricing flexibility for high capacity services.

In any event, there can be no question that SBC already possesses a great deal of pricing flexibility. Most significantly, SBC has the freedom to offer volume and term discounts on just the services that are the subject of this Petition. SBC also has the freedom to drop its prices as low as it likes to all customers within zones of high population density. This flexibility offers more than enough freedom to compete under current circumstances, freedom that SBC has exploited aggressively in the marketplace.

Finally, SBC has filed this Petition at a time when the FCC is considering in its Access Charge docket whether and under what conditions it should grant ILECs pricing flexibility. It is far more appropriate to make the policy decisions called for in the Petition in the context of the more complete record in that proceeding. At most, therefore, the Petition should be considered an attempt, albeit a highly flawed one, to supplement the record in the Access Charge docket.

II. SBC HAS FAILED TO DEMONSTRATE THAT IT HAS MADE THE REQUISITE SHOWING FOR THE ELIMINATION OF DOMINANT CARRIER REGULATION FOR HIGH CAPACITY SERVICES.

As SBC concedes, the crux of the Section 10 forbearance standard applicable here is whether SBC has market power in the provision of dedicated high capacity services in the fourteen Metropolitan Statistical Areas ("MSAs") discussed in the Petition. Petition at 7. This is not a close question. There is no basis in either FCC precedent or sound policy for concluding that SBC lacks substantial and persisting market power in the provision of high capacity services.

A. SBC Has Not Defined A Relevant Market.

The threshold issue in assessing a firm's market power is the definition of the relevant market.[2] SBC and its experts, Quality Strategies, offer no basis for concluding that their chosen product and geographic markets are anything more than artificial constructs designed to advance SBC's goal of shedding current regulatory constraints.

1. The Relevant Product Market

SBC asserts that the principle of supply substitutability, that "all services that may be provided by the same facilities [are] in the same market," should be applied to determine the

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2 See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271, ¶ 19 (1995) ("AT&T Non-Dominant Order").

parameters of the relevant product market. Petition at 9.[3] Applying that principle, SBC states that the product market here includes "special access services, switched access entrance facilities, and switched access direct trunked transport services that operate at DS1 and higher transmission speeds." Id. at n.2. SBC's definition of the product market excludes "switched access or special access dedicated transport at transmission levels of DS0 and below." Id. Yet both switched (local and access) and dedicated services at transmission levels of DS0 or below are provided over the same facilities as high-capacity services. Thus, under the supply substitutability standard suggested by SBC, the market is much broader than services of DS1 capacity or higher.

Moreover, there is good reason to apply a supply-based approach to market definition in the local market. TWTC and other CLECs have discovered over the past several years that the high capacity dedicated transport services market alone is not large enough to justify the fixed, up-front costs necessary for local entry. Local entry can only be sustained if a CLEC utilizes its facilities to provide all switched local and access services and low capacity dedicated services, not just high-capacity transport. For example, maximum efficiency in the

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3 In applying supply substitutability to AT&T, the FCC concluded that both residential and business services should be considered as part of the same product market, even though customers did not view them as substitutes. Id., ¶ 23. This was because "it is clear that there is no significant difference between the interexchange facilities used to provide these services." Id.

utilization of a carrier's network facilities serving an office building can often be gained when the carrier can serve all businesses in the building, those with high capacity needs as well as those with DS0 or lower needs. Thus, it is highly relevant to the present analysis that SBC faces virtually no competition for local switched services. In any event, it is also clear that SBC has failed define the relevant market accurately.[4]

2. The Relevant Geographic Market

SBC has not demonstrated that the individual MSAs for which it seeks forbearance constitute the relevant geographic markets. In defining the relevant geographic market, "one must examine whether a 'small but significant and nontransitory' increase in the price of the relevant product at a particular location would cause a buyer to shift his purchase to a second location." BOC In-Region Order, n.174. It is not at all clear that MSAs meet this standard.

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4 The FCC has recently used demand substitutability, defined as "all products or services that consumers view as substitutes for each other, in response to change in price," to define product markets. See Regulatory Treatment of LEC Provision of Interexchange Service Originating in the LEC's Local Exchange Area, *Second Report and Order*, 12 FCC Rcd 15756, ¶ 27 n.79 (rel. Apr. 18, 1997) ("BOC In-Region Order"). As mentioned, the supply substitutability standard is appropriate here because it reflects marketplace realities accurately. In any case, SBC has not even attempted to show that there are no substitutes for high-capacity services. For example, SBC has not provided an analysis as to why low capacity (including switched) products are not part of the same product market. Thus, under the demand substitutability standard the Petition is also plainly deficient.

For example, ILECs generally offer high-capacity services to large businesses on a statewide or regionwide basis. SBC's "High Capacity Term Pricing Plan" or "HC-TPP" offered under its Tariff F.C.C. No. 73, relevant sections of which are attached hereto as Exhibit A, illustrates the point. HC-TPP is available either on a LATA, state, or region-wide basis, and it allows high capacity service customers[5] that agree to minimum volume and term (three or five years) commitments to move locations within the relevant area without incurring termination charges that would otherwise apply.[6] The HC-TPP offering indicates that there is substantial demand among SBC's high capacity customers for discounted offerings on a LATA, state and region-wide basis. It also reflects the fact that many customers can only aggregate enough traffic volume to justify a volume discount if all of a customer's locations in a LATA, state or region are served by a single service provider.

In defense of its choice of MSAs as the relevant geographic market, SBC states only that "[t]he demand for high capacity dedicated transport services is concentrated primarily in urban areas." Petition at 11. SBC offers no basis, however, for concluding that each individual urban area should be considered a separate geographic market rather than all urban areas within a

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5 The rate elements covered by the offering are (1) High Capacity Channel Termination, (2) High Capacity Channel Mileage (Fixed and Per Mile), (3) High Capacity Multiplexing, and (4) the so-called Securenet options for Missouri. See Exh., Section 7.2.20(B).

6 The HC-TPP offering is discussed further *infra*.

state or region. Thus, in this regard as well, the Petition is fatally deficient

B. SBC Has Not Come Close To Demonstrating That It Lacks Market Power In The Provision Of High Capacity Services.

In the light of the previous discussion, no further analysis is required. Assuming *arguendo* that the issue must be reached, it is obvious that SBC's analysis of its market power is both incomplete and inaccurate. When factors such as the ubiquity of SBC's network, its control over bottleneck facilities and its massive scale and scope economies are considered, there can be no other conclusion than that SBC continues to possess substantial and persisting market power for high capacity services. Nor does the Quality Strategies study aid SBC's cause. That study essentially consists of general conclusions for which virtually no underlying data are provided. It is therefore impossible to judge the completeness or thoroughness of the study, rendering it largely useless.

1. Supply Elasticity

The FCC considers two factors in assessing supply elasticity, supply capacity of existing carriers and entry barriers. See AT&T Non-Dominance Order, ¶ 57. Both factors indicate that SBC continues to have the ability to abuse its market power over high-capacity services.

First, there is no basis for concluding that there is adequate alternative capacity in the provision of high capacity services. This is because CLEC networks often do not cover even an entire MSA, as the maps attached to the Quality Strategies study show. CLECs consequently have trouble competing with SBC for many of the customers with locations within and beyond to scope of the CLEC's network.

For example, even though TWTC has one of the largest CLEC networks in the Houston MSA, TWTC has not been able to compete for the high capacity business of large oil companies with offices within the city of Houston (i.e., within the area served by TWTC's network) and with refineries located to the east of Houston in towns such as Freeport and Beaumont (which are outside the reach of TWTC's network). Like most high capacity customers, these companies prefer to purchase all of their service from a single source. As a result, TWTC is essentially unable to compete for the high capacity services of these customers.[7] Any analysis of alternative capacity must account for such limitations of CLEC networks.

More importantly, the CLECs generally have facilities in just a handful of the 14 MSAs listed in the Petition. Only WorldCom has facilities in more than half of the MSAs listed. As a result, customers with locations in multiple MSAs have far fewer facilities-based alternatives than is apparent from SBC's discussion of the issue. Thus, TWTC has had some success in competing for customers that have locations in Austin, San Antonio and Houston, all areas in which TWTC has its own network. However, TWTC's network cannot necessarily be considered an

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7 Moreover, because ILECs still do not provide unbundled elements on a nondiscriminatory basis, TWTC generally does not attempt to provide service using such facilities.

alternative source of supply for a customer with offices in those cities and also in Dallas.

SBC complains that regulation prevents it from responding adequately to requests from customers "such as TU Electric, General Electric, WalMart, Lucent Technologies, and MCI WorldCom" that have asked SBC to "discount DS1 and DS3 services based on overall demand within a LATA or a State."[8] Petition at 24. But absent regulatory constraints, SBC would likely be the only supplier able to meet these customers' LATA-wide and State-wide needs on its own network. Further, the fact that WorldCom, by far the largest facilities-based CLEC in the SBC region, needs to ask SBC to provide high capacity services throughout LATAs and states further supports the view that CLEC high capacity supply is simply insufficient at this time.

Given the limitations of CLECs as a source of alternative capacity, entry barriers become critically important because they indicate whether more supply can be added quickly in response to dominant firm price increases. Of course, the entry barriers are extremely high in the facilities-based CLEC business (e.g., huge capital investments, the need for access to rights-of-way, the need for cooperation from ILECs to interconnect and arrange for collocation). Given the limited coverage of the CLEC networks

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8 In the light of SBC's HC-TPP offering, it is difficult to see why SBC could not meet this request under current regulation. It should also be noted that the customer requests for services "based on overall demand within a LATA or a state" further support the conclusion that the geographic market for high capacity services is larger than a single MSA.

and the high barriers to entry, it is clear that supply elasticity is low for high capacity services.

2. Demand Elasticity

SBC's statements regarding demand elasticity are simply conclusory. The FCC has, as SBC points out, stated that large business and carrier customers demonstrate elastic demand for long distance service. Petition at 16. But SBC has provided no proof at all that this is so for high capacity services. For example, SBC might have provided evidence of customer churn rate, as AT&T did in seeking non-dominant status. See AT&T Non-Dominant Order, ¶¶ 53, 63. SBC might also have submitted evidence of increases in advertising and marketing expenses since CLEC entry, as AT&T also did in seeking non-dominant status. See id., ¶ 64. In any event, bald statements that the principles adopted in the long distance market regarding demand elasticities apply here are simply insufficient.

3. SBC's Cost Advantages

Although barely mentioned in the petition by SBC, a carrier's relative cost advantages can be of critical importance in analyzing its market power. See id. ¶ 73. In this regard, the FCC considers whether a firm's relative cost advantages "are so great to preclude the effective functioning of a competitive market." Id. There is little question that SBC's cost advantages preclude effective competition at this point.

In the initial stages of competition, CLECs simply do not possess economies of scale. They have invested heavily in the large fixed costs of providing service, and must recover those costs. SBC, on the other hand, has already recovered the cost of the initial investment required to provide service and has the customer base that allows it massive economies of scale. CLECs will never be able to match those economies of scale until they have acquired a significant share of the switched local market, something they are not close to achieving.[9]

Nor is it even relevant to the market power analysis to state, as SBC does, that SBC's superior economies of scale are not necessarily the result of unfair competition. Petition at 20. In truth, SBC's economies of scale are a legacy of its status as a legally protected monopoly. Over time, more efficient firms will develop similar or superior economies. But the relevant issue is that SBC's incremental costs of providing high capacity services are lower than CLECs' and that cost advantage results in market power.

4. SBC's Control Over Bottleneck Facilities.

SBC says virtually nothing in the Petition about its control over bottleneck facilities, another issue the FCC considers highly relevant to the question of market power. See BOC In-Region Order, ¶ 98. SBC of course continues to control many essential CLEC inputs of production (e.g., collocation, unbundled loops and other UNEs, interconnection trunks etc.). Even

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9 While SBC cites the excess capacity in certain geographic areas as evidence of supply elasticity, Petition at 19-20, that phenomenon can more sensibly be understood as proof that most CLECs currently lack the customer base to achieve the economies of scale necessary to compete in a deregulated local market.

facilities-based CLECs such as TWTC must rely on many or all of these inputs from SBC. Moreover, it has not been demonstrated (for example in Section 271 proceedings) that SBC is actually providing these inputs on reasonable and nondiscriminatory terms and conditions.

As a result of its control over bottleneck facilities, SBC has the opportunity and incentive to engage in anticompetitive behavior.[10] First, SBC can provide slow responses to CLEC service requests and create unnecessary technical obstacles in order to delay a CLEC's entry. Second, SBC can provide slow response times for service change requests for existing CLEC high capacity customers or cause difficult-to-detect service degradation so that CLEC high capacity customers view CLEC service as inferior.

In sum, unlike AT&T and BOC Section 272 affiliates (both deemed non-dominant by the FCC), SBC controls essential inputs of production for competitive service. Until that control is relinquished, SBC will have the power to influence which CLECs succeed and which do not.

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10 In rejecting SBC's previous request for pricing flexibility to respond to RFPs, the FCC relied upon SBC's control over bottleneck facilities required by CLECs. See Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, *Order Concluding Investigation and Denying Application for Review*, 12 FCC Rcd 19311, ¶ 51 (1997) ("SBC RFP Tariff Order"). The FCC found that such control increased SBC's market power and was a further reason for retaining dominant carrier regulation of SBC's high capacity services.

5. SBC's Market Share.

SBC argues that its market share (in most cases over 60%) is not indicative of market power because the FCC found AT&T to be non-dominant where it held approximately 60% of the long distance market. Petition at 13-15. As preliminary matter, it is impossible to determine whether the market share estimates provided by SBC and Quality Strategies are even accurate since neither has provided any supporting documentation.[11] In any event, the FCC based its AT&T decision on its conclusions that AT&T had demonstrated the presence of significant supply and demand elasticities in long distance, that AT&T did not enjoy large cost advantages over its competitors, and that AT&T did not control bottleneck facilities. See AT&T Non-Dominance Order, ¶¶ 57-73. Since none of these factors weighs in SBC's favor, its substantial market share (even assuming the market has been accurately defined) only further supports the view that SBC possesses substantial market power.[12]

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11 The Quality Strategies report states that its conclusions regarding market share are based on "available information" on the provision of high capacity, SBC's "in-house, proprietary data," comparisons with metropolitan areas outside of SBC's region, and Quality Strategies' "internal databases on competitors." See Quality Strategies Report at 47. Since none of this information is provided in the report, there is no basis for determining whether the report accurately characterizes the data or indeed if the data themselves are reliable.

12 Indeed, in a factual context quite similar to the instant Petition, the FCC found that SBC's loss of 43 and 38 percent of the high-capacity services offered in Dallas and Houston respectively to competitors to be insufficient evidence of a lack of market power. See SBC RFP Tariff Order, ¶¶ 46-47.

III. COMPETITION WILL BE SEVERELY HARMED IF SBC'S HIGH CAPACITY SERVICES ARE REGULATED AS NON-DOMINANT SERVICES.

In the absence of a clear and convincing demonstration that SBC lacks market power, the FCC must continue to apply dominant carrier regulation to SBC. This is because the potential harm to competition of deregulating SBC is greater than the cost that may be associated with that regulation. If SBC were treated as a non-dominant carrier it would be able to engage in strategic behavior that would stop potential competitors from entering and discourage existing entrants from expanding their entry. The lost benefits of competition far outweigh any minimal and short term benefits that could be gained from deregulating SBC.

Most importantly, non-dominant regulation would eliminate the requirement that SBC charge the same prices to all customers across a particular geographic area (e.g., population density zones). SBC would therefore be permitted to engage in a predatory strategy in which it drops rates for specific customers.

For example, SBC would likely take advantage of the fact that its competitors do not know SBC's cost of providing service. SBC could set high capacity prices low, although not necessarily below cost, for selected customers. In this way, SBC would signal to CLECs that have entered or are considering entry that SBC's costs are so low that the CLECs are better off not expanding entry or entering at all. Alternatively, SBC could use such selective price reductions simply to establish a reputation as a ruthless competitor. Again, the deterrence effect is the same.[13]

Unlike traditional notions of predatory pricing, signalling and reputational predation are not especially costly to the predator and can be highly rational. The predator's "investment" in predation is limited to a few customers, and indeed there is no requirement that the predator price below cost for the strategy to succeed. The "return" on the investment is the reduced level of competition over time and across its service area.[14]

This strategy is especially likely to succeed in deterring entry in the local telecommunications market. The large initial investment required for local entry makes CLECs especially reluctant to enter where there is a diminished chance of amassing enough customers to achieve the economies of scale needed to compete. Especially in the early stages of competition, CLECs are also often disproportionately reliant on a small number of large customers, another factor that makes strategic pricing particularly dangerous.

Moreover, the elimination of price regulation on SBC would also allow it to pay for steep reductions in rates where it faces

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13 See Janusz A Ordover and Garth Saloner, "Predation, Monopolization, and Antitrust" in *Handbook of Industrial Organization*, Richard Schmalensee and Robert Willig, eds., Vol. I, 1989 Elsevier Science Publishers B.V., pp. 550-561 (surveying literature demonstrating the rational basis for "predation for reputation" and "predation for signalling").

14 See id.

competition with higher rates for high capacity services where it faces little or no competition. The opportunity to engage in this form of behavior is almost inevitable since any geographic market definition will likely include areas where SBC is the only available network.

The FCC has recently held that SBC would likely engage in strategic pricing behavior if prematurely granted the freedom to offer customer-specific rates. See SBC RFP Tariff Order. In explaining the problem, the FCC observed that in order to enter the competitive access market, "a new entrant must be able to attract a sufficient amount of business to achieve significant economies of scale." Id., ¶ 49. Such economies of scale are necessary to recover the "large up-front investments" required for entry." Id. The Commission stated further that,

> A new entrant's decision to enter is, therefore, based on its expectation that it will be able to recover, within a reasonable time frame, its cost of these up-front investments, along with the on-going costs of providing access services, plus a reasonable return on its investment. SWBT, being an incumbent provider, has already made such investment and has a customer base that allows it to benefit from significant economies of scale. Therefore, it may well be in SWBT's long-term interest to deprive entrants of the opportunity to achieve significant economies by locking in large customers using customer-specific, long-term contracts before a competitor enters on a facilities basis. SWBT may find it advantageous to offer lower prices to a few relatively large access customers even when such reductions might not, in the short term, contribute as much to profits as would a generally available tariffed rate.

Id. Moreover, the Commission recognized the reputational benefits to SBC of such strategic pricing. As the Commission explained,

> If the incumbent is able to develop a reputation of aggressively competing via targeted bids with recent entrants by doing so in a handful of markets, it may be able to dissuade potential entrants from entering any of its other markets. Thus, the incumbent may protect its monopoly position in all of its markets by aggressively competing in markets where entry initially occurs.

Id., ¶ 50.

It is significant that the FCC reached these conclusions in a context similar to the instant petition. There, as here, SBC sought virtually unfettered ability to drop prices selectively for high capacity services within its region. Moreover, in both cases, SBC relied on the fact that it had lost roughly 40% of the high-capacity business in urban markets (only Dallas and Houston were mentioned in the earlier request) along with anecdotal evidence of competitive entry.

Nor is it an adequate response that such an analysis prevents SBC from charging more competitive prices that benefit consumers. Telecommunications is a highly dynamic market in which technology is likely to enable new entrants eventually to operate more efficiently than incumbents. To allow SBC to engage in strategic pricing at this stage in the development of competition is to run the risk that those more efficient firms of the future are never able to become established. A highly restricted class of consumers could receive lower prices in the short run if SBC is granted the flexibility it currently seeks. But a much broader range of consumers is likely to receive much more substantial efficiency gains if competition is allowed to develop.[15]

Finally, it is also significant that SBC has attempted to use the pricing flexibility it currently possesses to selectively drop prices to capture large customers. The HC-TPP offering includes several powerful mechanisms designed to lock up customers with telecommunications needs that exceed the limits of a single MSA. The critical point here is that only SBC is able to serve most of these customers at this point. Thus, in addition to the minimum term requirements, any HC-TPP customer that exceeds (by 10% for the three year commitment and by 15% for the five year commitment) or wishes to decrease its agreed-upon volume commitment incurs substantial penalties. See Exh., § 7.7.20(C)(1)(b), (d). Customers therefore have a strong incentive to commit to the three to five year term for *all* of their high capacity needs within the region. The tariff also includes substantial penalties for early termination. See id., § 7.2.20(D)(3). In addition, since, as mentioned, customers are not charged termination fees for replacing service in one location with service in another, customers have little incentive

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15 See James Meeks, "Business Law Symposium: Entering A New Era In Telecommunications Law: Essay: Predatory Behavior A An Exclusionary Device In The Emerging Telecommunications Industry" 33 Wake Forest L. Rev. 125 (1998) (concluding that strategic pricing behavior is peculiarly suited to emerging competition in telecommunications markets and suggesting that "[p]erhaps utilities should be prohibited from pricing at different levels, particularly in formerly regulated markets undergoing transition from regulated to competitive markets, or a mix thereof, in order to gain all the benefits of competition in the long run").

to consider using a CLEC (and thus incur a termination charge) in the new location.

If SBC were given the pricing flexibility it requests here, it would simply gain the freedom to apply the mechanisms used in the HC-TPP *as well as* steep price reductions for individual customers. The result would be that CLECs would be precluded from competing for many large customers and would probably be deterred from expanding their entry further within the SBC region.

IV. SBC ALREADY POSSESSES A GREAT DEAL OF PRICING FLEXIBILITY.

As the FCC has repeatedly recognized, SBC and other ILECs already possess more than adequate pricing flexibility to compete fairly in the high-capacity market. For example, ILECs can offer volume and term discounts on special access and switched transport services, which encompass the high capacity services for which SBC seeks non-dominant treatment.[16] They can geographically deaverage (in accordance with zones of population density) these services.[17] The FCC has removed the lower pricing limits in price caps, so that SBC may drop its averaged rates to cost[18] and it has relaxed the procedures required for ILECs to

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16 See Expanded Interconnection With Local Telephone Company Facilities, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶¶ 171, 174-176 (1994).

17 See id. at ¶¶ 153-156.

18 See Access Charge Reform, *Notice of Proposed Rulemaking and Third Report and Order*, 11 FCC Rcd 21354, ¶ 305-306 (1996) ("Access Charge NPRM/Order").

introduce new services.[19] Finally, SBC may freely increase and decrease the price of services in the trunking basket so long as it does not exceed the relevant price cap for the basket overall. As the FCC recognized in the SBC RFP Tariff Order, this level of pricing flexibility is fully adequate to allow SBC respond to the level of competition that currently exists.[20]

A review of Pacific Bell's and SBC's rates for high capacity services demonstrates the extent to which they are able to lower prices to meet competition. For example, under Pacific Bell's Tariff FCC No. 128, purchasers of a single DS1 channel in Zone 1 receive a discount of 34% off of the Zone 3 price. The discount for DS1 channel termination non-recurring rates in Zone 1 is 27% off of the Zone 3 rate.

SBC's Tariff FCC No. 73, offers customers that commit to three year contracts under HC-TPP a 50% discount on non-recurring charges off of the month-to-month rate. For a single DS1 channel termination in Zone 1, the monthly rate for the five year HC-TPP is discounted 33% from the month-to-month rate. Similarly, the customers that commit to purchase DS1 level channel mileage for five years in Zone 1 receive a 25% discount for fixed charges and a 33% discount for per mile charges off of the month-to-month rate. Similar discounts are offered for multiplexing.

This point is even more clearly illustrated by rates SBC and Pacific Bell charge for their DS3 services. For example, Pacific

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19 See id. at ¶¶ 309-310.

20 See SBC RFP Tariff Order, ¶ 56.

Bell's Tariff FCC No. 128, Section 7.5.9(A) contains channel termination rates for its Fiber Advantage DS3 services. For a single DS3 channel termination in Zone 1, the monthly rate for the 5-year rate stability plan is discounted by 45% from the month-to-month plan. The 5-year rate for a package of three DS3 channel terminations (DS3X3) is discounted by 63% from the month-to-month plan, while the twelve DS3 package (DS3X12) is similarly discounted by nearly 75%. In addition, nonrecurring charges are waived for the installation of all Fiber Advantage Services under the 5-year plan. Under the month-to-month plan, a package of twelve DS3 channel terminations (three DS3X3 services, as DS3X12 is not available under month-to-month pricing) is priced at $30,000 per month with a nonrecurring charge of approximately $225,000. Under the 5-year plan, a package of twelve DS3 channel terminations (DS3X12) is priced at $8,200 per month with nonrecurring charges waived.

Thus, it strains credulity to assert, as SBC does, that current regulation is "onerous," Petition at 21, and that its hands are tied. The evidence SBC provides in support of this assertion is unconvincing. SBC offers no supporting documentation for the instances in which it claims to have lost business because of regulation. Petition at 23-25. It is therefore impossible to determine whether SBC has accurately characterized these situations.

In any event, as demonstrated, SBC offers large price reductions in the form of volume and term discounts and waived nonrecurring charges wherever it encounters competitive entry (i.e., Zone 1). Based on the available evidence, therefore, the only possible conclusion is that SBC possesses more than adequate pricing flexibility at this time.

V. THE ISSUES RAISED IN THIS PROCEEDING ARE MOST APPROPRIATELY ADDRESSED IN THE ACCESS CHARGE PROCEEDING.

Even apart from SBC's failure to provide any support for its request for non-dominant regulation, it has filed its request in the wrong proceeding. In the Access Charge proceeding, the FCC is considering proposals concerning the appropriate level of competition an ILEC faces before it may receive the very pricing flexibility requested here by SBC. Access Charge NPRM/Order, ¶¶ 168-217. Thus, the issues raised in SBC's petition substantially overlap with those raised in that proceeding, and the instant petition should simply be incorporated into the Access Charge proceeding.[21]

As the Commission recognized in the SBC RFP Tariff Order (at ¶ 53), the issues raised in the instant petition are far more appropriately addressed in the context of the comprehensive Access Charge proceeding. Absent a broader framework, the Commission will be forced to field endless piecemeal requests by ILECs to grant different levels of regulation for particular services in particular areas without the aid of guiding

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21 SBC itself seems to acknowledge that its petition can be understood as simply an attempt to update the record in the Access Charge proceeding regarding the level of competition faced for high capacity services. See Petition at 3 (stating that the "record" in the Access Charge proceeding "is already out of date").

principles for reviewing those requests.[22] The Commission should therefore incorporate the instant petition into the Access Charge docket and address it in that context.

VI. CONCLUSION

For the reasons described above, the Commission should reject SBC's petition for non-dominant regulation of its high-capacity services in the 14 MSAs listed in the petition.

Respectfully submitted,

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22 In addition to the instant request, the FCC has already received similar requests for non-dominant treatment from U S West and Bell Atlantic. See Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix Arizona MSA, CC Docket No. 98-157; "Bell Atlantic Seeks Price Flexibility For Special Access Services" Communications Daily, Jan. 21, 1999 at 2.

EXHIBIT

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP)

(A) General Description

High Capacity Term Pricing Plan (HC-TPP) provides the customer with rate stabilization and discounted tariff rates. The customer agrees to a minimum monthly revenue commitment when establishing service under HC-TPP.

The minimum monthly revenue commitment is established on a per LATA, state or company level as described in 7.2.20(C)(1) (Minimum Monthly Revenue Commitment). When the minimum monthly revenue commitment is met at the LATA, state or company level, the customer has the ability to move an HC-TPP circuit within the level specified from one location to another location without incurring a Termination Charge.

Decreases in HC-TPP monthly recurring tariff rates will be passed on to customers who participate in an HC-TPP. The customer's minimum monthly revenue commitment will be reduced accordingly. The Telephone Company will notify customers participating in HC-TPP when monthly rates are decreased.

Should the Telephone Company increase its rates during the HC-TPP period, the customer would continue to pay the rates in effect at the time the customer elected to establish service under HC-TPP.

If the customer upgrades to MegaLink Custom, STN or (T)
ReliaNet Service, the minimum monthly revenue commitment (T)
will be decreased to reflect the decreased number of circuits.

(B) Services Available Under HC-TPP

A customer may elect to participate in HC-TPP for the following rate elements as described in 7.3 (Service Descriptions, Rates and Charges):

- High Capacity Channel Termination
- High Capacity Channel Mileage (Fixed and Per Mile)
- High Capacity Multiplexing
- Securenet options for Missouri as set forth in 7.2.20 (F).

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions

(1) Minimum Monthly Revenue Commitment

The customer agrees to a minimum monthly revenue commitment when electing to participate in a HC-TPP.

The minimum monthly revenue commitment is determined when the customer specifies the quantity of services to be included in the HC-TPP. That amount is then calculated using the current HC-TPP rates in effect at the time to arrive at the minimum monthly revenue commitment.

The minimum monthly revenue commitment is calculated as follows:

(Number of circuits ordered) X (Rates in effect when customer establishes service under HC-TPP)

= Initial minimum monthly revenue commitment.

The customer may establish the HC-TPP minimum monthly revenue requirement at LATA, state or company level as follows: (C) (C)

Less than 71% of total DS1 revenues is established as HC-TPP = LATA

71% to 90.99% of total DS1 revenues is established as HC-TPP = state (C)

91% or greater of total DS1 revenues is established as HC-TPP = company (C) (C)

(a) Maintaining the Minimum Monthly Revenue Commitment

A customer who chooses the state level must maintain that level of minimum monthly revenue commitment for a minimum of one quarter before returning to a LATA level. At the quarterly review, if the level is below 71%, the (T) customer has 30 days to increase the revenue to between 71% and 90.99% to maintain the (C) state level.

If the customer elects not to increase the revenues, the minimum monthly revenue (C) commitment will be modified to reflect the LATA level and an Access Order charge will apply.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(1) Minimum Monthly Revenue Commitment (Cont'd)

(a) Maintaining the Minimum Monthly Revenue Commitment (Cont'd)

A customer who chooses the company level must maintain that level of minimum monthly revenue commitment for a minimum of one year.

After the minimum one year commitment is met, quarterly reviews will be conducted. At the quarterly review, if the level is below 91%, the customer has 30 days to increase the revenue to 91% or greater to maintain the company level. (C) (C)

If the customer elects not to increase the revenues, the minimum monthly revenue commitment will be modified to reflect the state level and an Access Order charge will apply.

(b) Exceeding the Minimum Monthly Revenue Commitment

The customer is permitted to exceed the minimum monthly revenue commitment by 10 percent throughout the life of a 3 year HC-TPP or by 15 percent throughout the life of a 5 year HC-TPP. If the customer exceeds the minimum monthly revenue commitment by more than 10 percent on a 3 year HC-TPP, that portion of the minimum monthly revenue commitment will be assessed and billed a 20 percent adjustment factor. If the customer exceeds the minimum monthly revenue commitment by more than the 15 percent on a 5 year HC-TPP, that portion of the minimum monthly revenue commitment will be assessed and billed a 30 percent adjustment factor. The revenue commitment amount will be reconciled quarterly.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(1) Minimum Monthly Revenue Commitment (Cont'd)

(b) Exceeding the Minimum Monthly Revenue Commitment (Cont'd) (M)

The adjustment factor will be billed until such time as the customer establishes a new revenue commitment or the billing no longer exceeds the 10 or 15 percent allowance. (M)

The adjustment factor will not apply to the company level minimum monthly revenue commitment. (C)

(c) Increasing the Minimum Monthly Revenue Commitment

The customer has the option to increase the minimum monthly revenue commitment rather than pay the adjustment factor. If the increase is received within 30 days of the time the adjustment factor was billed, the adjustment factor will not apply. To initiate an increase in the minimum monthly revenue commitment, the customer must provide the amount of the increase in writing with the understanding that this increased minimum monthly revenue commitment becomes the new minimum monlthly revenue commitment.

The increased minimum monthly revenue commitment would be calculated as follows:

(Rates in effect when customer established increased service under HC-TPP) X (Service to be added) + (Existing minimum monthly revenue commitment)

= Increased minimum monthly revenue commitment.

An increase in the minimum monthly revenue commitment does not change any of the conditions in effect during the life of the HC-TPP.

Certain material appearing on this page formerly appeared on 1st Revised Page 7-65.3.

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(1) Minimum Monthly Revenue Commitment (Cont'd)

(d) Decreasing the Minimum Monthly Revenue Commitment (T) (M)

The customer may elect to decrease the minimum monthly revenue commitment at any time during the life of the HC-TPP. To initiate a decrease in the minimum monthly revenue commitment, the customer must provide the amount of the decrease in writing with the understanding that the decreased minimum monthly revenue commitment becomes the new minimum monthly revenue commitment.

The decreased minimum monthly revenue commitment will be calculated as follows:

Existing minimum monthly revenue commitment - Decrease in minimum monthly revenue commitment

= Decreased (new) minimum monthly revenue commitment.

In addition, the customer will be assessed a termination charge of 20% on either a 3 year or 5 year HC-TPP as follows:

Termination percentage X Decrease in minimum monthly revenue commitment X Months remaining in revenue commitment

= Termination charge.

A decrease in the minimum monthly revenue commitment does not change any of the conditions in effect during the life of the HC-TPP. (M)

Material and revised material appearing on this page previously appeared on Original Page 7-65.4.

Material previously appearing on this page now appears on 1st Revised Page 7-65.6.

(This page filed under Transmittal No. 2374)

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(2) Nonrecurring Charges

(D)

(D)

The HC-TPP nonrecurring charges, as described in 7.3 (Service Descriptions, Rates and Charges), will apply for those services ordered and installed under a 5 Year HC-TPP. The nonrecurring charges will not apply toward the minimum monthly revenue commitment.

The HC-TPP nonrecurring charges, as described in 7.3 (Service Descriptions, Rates and Charges), do not apply to existing services that are to be billed under HC-TPP; however, the Access Order Charge (AOC) as defined in 5.2 (Access Order) will apply.

(3) Renegotiation

The customer may choose to terminate an existing HC-TPP before the end of the three or five year period and negotiate a new three or five year HC-TPP without termination liability provided the new HC-TPP meets the following requirements:

(a) the new HC-TPP must represent a greater minimum monthly revenue commitment than the previous HC-TPP, and

(b) the new HC-TPP must be based upon the rates that are currently in effect and available to all customers.

An existing three year HC-TPP may be converted into a five year HC-TPP without termination liabilities, provided that:

(a) the three year HC-TPP has not ended,

(b) the converted HC-TPP must be based upon the rates that are currently in effect and otherwise available to all customers, and

(c) the customer's minimum monthly revenue commitment will be adjusted accordingly, based upon the applicable five year HC-TPP rates times the customer's current HC-TPP number of circuits ordered.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(3) Renegotiation (Cont'd)

When the customer converts to a five year HC-TPP, actual time in service for the original HC-TPP will be applied to the new HC-TPP. However, no credits or refunds will apply for the billing of actual time in service for the previous HC-TPP.

(4) Renewal

The customer must provide the Telephone Company with a written notice of intent to renew or extend an HC-TPP no later than 60 days prior to its expiration. The renewal rates will be the rates that are currently in effect and available to all customers. If the customer elects not to renew or extend the HC-TPP, or does not notify the Telephone Company of its intent to renew or extend the HC-TPP, the customer's service will automatically be billed under the tariffed month-to-month rates in effect at the time the HC-TPP expires.

(5) Extension of Service

The customer may elect to extend the existing HC-TPP for a single, additional 24 month period at the current rates for the three or five year HC-TPP being extended. If the current HC-TPP rates are lower than the original HC-TPP rates, the customer's minimum monthly revenue commitment will be adjusted accordingly. If current HC-TPP rates create a minimum monthy revenue commitment higher than the existing minimum monthly revenue commitment, the customer's existing minimum monthly revenue commitment will continue to apply.

The customer must provide the Telephone Company with a written notice of intent to extend the HC-TPP no later than 60 days prior to the expiration of the service period.

Certain revised material previously appearing on this page now appears on 6th Revised Page 7-65.8.

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(C) Terms and Conditions (Cont'd)

(6) Upgrades of Service

A customer may upgrade HC-TPP circuits to MegaLink Custom, STN or ReliaNet Service without termination liability given that:

(a) the customer identifies the High Capacity circuits being moved,

(b) the MegaLink Custom, STN or ReliaNet Service that the above High Capacity circuits are being moved to is a new MegaLink Custom, STN or ReliaNet Service,

(c) the upgrade rates are based on those rates currently in effect in Sections 19.4, 20.5 or 31.3.3 (Rates and Charges) and available to all customers, and

(d) the due date to disconnect the HC-TPP and the due date to connect the MegaLink Custom, STN or ReliaNet Service must be the same.

The AOC will apply.

(7) Conversion from HC-TPP to Other SWBT Services (C)

A customer may convert an existing HC-TPP to other access services, without termination liabilities if all of the following criteria are met: (C)

(a) the customer identifies the HC-TPP circuits being moved,

(b) the HC-TPP circuits must be converted to other SWBT services, (C)

(c) the new service represents equal to or greater than revenue remaining in the HC-TPP service period being converted,

(d) the new contract should have termination liability plan equal to or greater than the HC-TPP being replaced, (C)

The AOC will apply.

ACCESS SERVICE

7. Special Access Service (Cont'd)

7.2 Rate Regulations (Cont'd)

7.2.20 High Capacity Term Pricing Plan (HC-TPP) (Cont'd)

(D) Rate Applications (M)

(1) Billed Revenues

If the customer reduces the number of circuits under HC-TPP without decreasing the minimum monthly revenue commitment, the initial minimum monthly revenue commitment will be billed.

(2) Special Construction Charges

Any special construction charges incurred for services billed under an HC-TPP will apply. These charges do not apply toward the minimum monthly revenue commitment.

(3) Termination of Service

Customers requesting the termination of an HC-TPP prior to the expiration date, excluding HC-TPP terminated as a result of a renegotiation, will be charged as indicated following:

HC-TPP	Termination Percentage
3 years	20%
5 years	20%

The termination charge will be calculated as follows: (M)

Minimum monthly revenue commitment	X	Months remaining in HC-TPP	X	Termination percentage

= Termination charge.

Customers requesting the termination of an HC-TPP prior to the expiration date of an extension of service will be calculated as follows:

Number of months utilized of the extension of service	X	Current Monthly Rate	-	HC-TPP Monthly Rate

= Termination charge.

Certain material appearing on this page formerly appeared on 5th Revised Page 7-65.8.

Certain material previously appearing on this page now appears on 3rd Revised Page 7-65.10.

CERTIFICATE OF SERVICE

I, Carmen D. Minor, do hereby certify that on this 21st day of January, 1999, copies of the foregoing "Comments of Time Warner Telecom" were hand delivered and/or mailed by federal express to the following parties:

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